

# Völkerrechtsblog

Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler\*innen

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## CURRENT DEVELOPMENTS

# The first genocide of the 20th century before a domestic court

A New York Court about to decide on its jurisdiction in *Rukoro et al. v. Germany*

FELICIA STEPHAN — 28 May, 2018



Once more, Germany is confronted with compensation claims concerning wrongs committed in the past (see on this topic already the [post by Andreas Buser](#)). After unsuccessful previous [cases against Germany](#) by the Ovaherero and Nama people before the [Permanent Court of Arbitration](#) and [U.S. federal courts in Washington, D.C.](#), the pending [class action complaint](#) against the Federal Republic of Germany in the United States District Court Southern District of New York is the first one not to have been

dismissed immediately upon filing. After Germany's memorandum in support of its motion to dismiss was filed on May 8, 2018, a decision concerning the jurisdiction of the court can be expected soon. This contribution takes a closer look at the background of the case and the arguments of both parties.

## **Background**

In German South-West Africa (now Namibia), a colony acquired by Germany in the 1880s, the colonial authorities continuously expanded their control over the territory of the native Nama and Ovaherero people by taking their land and property by force. After a major uprising of the Ovaherero in 1904, the conflict culminated in the so-called Battle of Waterberg where, under the command of the German lieutenant general Lothar von Trotha, the Ovaherero were forced into the desert to die of thirst or be shot or hanged. Infamously, he ordered: *"Within the German boundaries, every Herero ... will be shot. I won't accommodate women and children anymore. I shall drive them back to their people or I shall give the order to shoot at them."*

The surviving Ovaherero were brought to "concentration camps" and subjected to forced labor. The same tactics were used against the Nama men, women, and children when they rebelled against the colonizers. During this time, approximately 65,000 Ovaherero and 10,000 Nama were murdered, decimating their people considerably.

Only in 2004, a member of the German government acknowledged Germany's "historical-political and moral-ethical responsibility" and conceded that the atrocities of 1904 to 1908 amounted to what would today be called a genocide. This statement, however, did not represent the official stance of the government at the time.

Nevertheless, since 2015 negotiations concerning reconciliation have been taking place between the German and Namibian government (mainly dominated by the Owambo people), but without representatives of the Nama and Ovaherero people.

In 2016, the German federal government finally confirmed that the killings of the Nama and Ovaherero between 1904 and 1909 constituted a genocide, but insisted that this classification did not entail any legal consequences.

### ***The current proceedings in the U.S.***

The plaintiffs, representatives of the Ovaherero and Nama people, seek reparation and compensation for damages resulting from the genocide and unlawful taking of property by the German colonial authorities from 1885 until 1909 in the former territory German South-West Africa and, based on the U.N. Declaration on the Rights of Indigenous Peoples, they want to enjoin and restrain Germany from excluding them from the negotiations between the German and Namibian governments concerning reconciliation and acknowledgement of the past atrocities.

Germany at first refused to participate in the proceedings, but appointed counsel and filed a motion to dismiss for lack of jurisdiction earlier this year upon the involvement of the U.S. State Department and the announcement of the judge in New York to decide the case without German participation.

### ***Jurisdiction under the Alien Tort Statute***

The plaintiffs primarily base the New York district court's jurisdiction on the Alien Tort Statute (ATS). The ATS gives original jurisdiction to federal district courts to decide civil actions brought by aliens with regard to a tort committed in violation of

the law of nations or treaty of the United States. Over the last decade, however, the U.S. Supreme Court has gradually narrowed the ATS' scope after the initial generous interpretation by the Second Circuit Court of Appeals in the case Filartiga v. Pena-Iralain 1980. (630 F.2d 876 (2d Cir. 1980).)

In the case Sosa v. Alvarez-Machain, the Supreme Court held that the ATS only provides a basis for federal subject matter jurisdiction, not, however, a cause of action. (542 U.S. 692, 729 (2004).) An actionable right can only be derived from an international norm which is "specific, universal, and obligatory" and comparable in definite content and widespread acceptance to the historical paradigm of the 18<sup>th</sup> century when the ATS was enacted, meaning violation of safe conduct, infringement of the rights of ambassadors, and piracy. (*Id.* at 715, 732.)

The first part of the complaint of the Nama and Ovaherero is the genocide committed by the German colonial authorities. In principle, the prohibition of genocide fulfills the Supreme Court's requirement of an international norm which is "specific, universal, and obligatory". However, the German counsel argues that the term genocide has only been part of international law since 1948 and cannot be applied retroactively. This is not uncontested, arguments have been drawn from the Hague Convention of 1899, which already prohibited reprisals against civilians, the Martens clause as expression of customary international law and the UN Whitaker Report on Genocide of 1985, which in paragraph 24 unmistakably qualified "the German massacre of Hereros in 1904" as genocide.

In support of the second part of the complaint, the plaintiffs cite Art. 18 of the U.N. Declaration on the Rights of Indigenous People which guarantees the right of indigenous people to participate in decision-making affecting their rights. Namibia and Germany both voted in favor of the Declaration in the U.N.

General Assembly. It is, however, a non-binding U.N. General Assembly Resolution and will most likely not be considered a “specific, universal, and obligatory” norm of international law.

Concerning the reach of the ATS, the Supreme Court decided in Kiobel v. Royal Dutch Petro. Co. that the ATS is presumed not to apply extra-territorially (569 U.S. 108, 118 (2013)) and that this presumption can only be rebutted when the claims “sufficiently touch and concern the territory of the United States”. (*Id.* at 124-125.) This sufficient link to the territory of the United States as required by *Kiobel* is questionable. The genocide took place in then German South-West Africa, the perpetrators were German nationals, and the victims were members of the Ovaherero and Nama peoples. However, some of the plaintiffs are permanently living in the U.S. now. It remains to be seen whether that will suffice.

### ***Germany’s sovereign immunity***

The plaintiffs argue that Germany is not immune from their complaint in the New York court because an exception to foreign sovereign immunity applies in the case of violations of international law. The plaintiffs specifically rely on the exception in § 1605 (a)(3) of the 1976 Foreign Sovereign Immunities Act (FSIA) regarding property taken in violation of international law. However, the exception has an additional requirement, a link between the property and the U.S. (present in its territory or connected to a commercial activity in the U.S. by the foreign State or its agencies). The plaintiffs do not elaborate on this requirement.

Exceptions to foreign sovereign immunity in cases of violations of customary international law have been discussed in court decisions, for example in Princz v. Federal Republic of Germany (26 F3d 1166 (D.C. Cir. 1994)), and in the U.S. Congress,

but attempts at codifying it have failed so far. In customary international law, exceptions to sovereign immunity exist for fiscal activities of states and an exception to state immunity is discussed in the case of gross violations of human rights. So far, however, these considerations have not achieved the status of customary international law. In 2012, the ICJ rejected in the Jurisdictional Immunities Case both the territorial tort exception and exceptions due to gross violations of international law concerning the atrocities committed by Germany during the Nazi regime. Therefore, the prospects of succeeding in this regard are rather slim.

## **Conclusion**

The case brought by representatives of the Nama and Ovaherero people against Germany faces several legal challenges and will most likely not succeed. It has, however, achieved worldwide media coverage and will at least raise sympathy for the cause. It might also increase pressure on the German government by NGOs and German parliamentary groups and might lead to an inclusion of Nama and Ovaherero representatives in the negotiation process concerning reconciliation between Germany and Namibia.

*Felicia Stephan is a LL.M. student at The George Washington University Law School (International and Comparative Law Program).*

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